Office Supreme Court, U.S.
FILED
JAN 31 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 598

PEORIA AND PEKIN UNION RAILWAY COMPANY, a corporation, ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, PEORIA AND EASTERN RAILWAY COMPANY, a corporation, CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY, a corporation, and UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

EUGENE R. JOHNSON,
DONALD G. BESTE,
First National Bank Building,
Peoria, Illinois,
Attorneys for Petitioner, Peoria and Pekin Union Railway Company

W. S. BODMAN,
STEPHEN L. SEFTENBERG,
120 West Adams Street,
Chicago 3, Illinois,
Attorneys for Petitioner, United States Trust Company of New York, as Trustee.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 598

PEORIA AND PEKIN UNION RAILWAY COMPANY, a corportation, ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, PEORIA AND EASTERN RAILWAY COMPANY, a corporation, CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY, a corporation, and UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioners Peoria and Pekin Union Railway Company ("P&PU") and United States Trust Company of New York as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950 ("trustee"), in accordance with rule 58, pray that this Court grant rehearing of its order of January 6, 1964, denying their petition for a writ of certiorari, ____ U. S. ____, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case, for the reason that the district court, with only one judge sitting, lacked jurisdiction to enter the order

herein complained of, because the order had the effect of setting aside an order of the Interstate Commerce Commission. The resulting circumvention of the prescribed statutory method of review raises substantial questions affecting the railroad industry generally and the public interest which should be determined by this Court. This reason is substantial and has not previously been presented by petitioners.

I.

In this proceeding a single judge granted a summary judgment in a declaratory judgment proceeding that certain vital provisions of the contract between P&PU and respondent Chicago and North Western Railway Company ("C&NW") delegating C&NW's switching and terminal work at Peoria, Illinois, exclusively to P&PU were invalid as unauthorized and therefore unlawful "pooling" within section 5(1) of the Interstate Commerce Act, 49 U. S. C. § 5(1), and were at the same time restrictions upon C&NW's competitive rights, *per se* unreasonable and violative of section 1 of the Sherman Act, 15 U. S. C. § 1. This judgment and a decree restraining P&PU from enforcing in any way its exclusive right were affirmed by the Court of Appeals for the Seventh Circuit in the face of the following considerations:

(1) In *Chicago & N. W. Ry. Co.—Joint Use*, I. C. C. Finance Docket No. 15354 (1946), the Commission specifically found performance of the P&PU-C&NW contract to be a transaction "within the scope of section 5(2)" (Joint Appendix 91), which refers to "joint use of any railroad line or lines . . . and terminals incident thereto," 49 U. S. C. § 5(2)(a)(ii), and specifically approved the provisions of the contract, necessarily including the exclusive right provisions, as just

and reasonable terms and conditions of the section 5(2) transaction.

(2) The Commission's jurisdiction under both sections 5(1) and 5(2) is made by section 5(11) "exclusive and plenary" and "any carrier . . . participating in . . . any transaction approved by the Commission thereunder, shall have full power . . . to carry such transaction into effect . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction." (49 U. S. C. § 5(11).)

(3) The contract containing the contested provisions had been submitted to the Commission for approval of its extended performance by C&NW itself in a petition filed under section 5(2) and containing as exhibits thereto, the contract and an opinion by C&NW's counsel; that "the proposed transaction meets with the requirements of the law and will be legally authorized and valid, if approved by the Commission" (Joint Appendix 235, 238).

(4) Section 2325 of the Judicial Code, 28 U. S. C. § 2325 provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate

Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

(3) Hundreds of contracts for switching and terminal services and for trackage rights containing terms similar to those here involved have been approved by the Commission under section 5(2) without any indication by the Commission or any court, so far as petitioners can discover, that the transactions approved should have been submitted under section 5(1) instead.

II.

Since the Commission has spoken, the single district judge lacked jurisdiction to enter the decree, which had the necessary effect of invalidating and setting aside the 1946 order of the Commission. While the C&NW avoided framing its declaratory judgment petition (as amended) in the form of a request for an injunction against the order, its request for an injunction against enforcing terms and conditions approved by that order amounted to the same thing. Cf. *Venner* v. *Michigan C. R. Co.*, 271 U.S. 127, 130 (1926) and *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.*, 258 U. S. 377, 381-382 (1922).

The holding below that the contested provisions were within section 5(1) was in complete derogation of the Commission's approval as "just and reasonable" and "consistent with the public interest" of all the terms and conditions of the contract, including the contested provisions, under section 5(2). Commission approval extended to the entire contract and precluded the application of section 5(1) to these same provisions.

By enjoining enforcement of a contract right approved

by Commission order, the decree below in effect enjoined enforcement of that aspect of the order itself. The policy behind the carefully-worked out statutory scheme, delegating in the first instance, the questions of "pooling" and antitrust exemption to the Commission and restricting review to a three-judge court, with direct review by this Court, was clearly stated in *Public Service Commission of Utah v. Wycoff*, 344 U. S. 237, 246 (1952) (involving the identical language of 28 U. S. C. 2281):

> . . . the declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decisions to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review.

Another requirement for direct review of the 1946 Commission order, evaded by means of the declaratory judgment procedure, is that an action to set aside the order would have to have been brought against the United States, 28 U. S. C. § 2322. In such proceedings, the Commission has the statutory right to intervene in defense of its order, 28 U. S. C. § 2323. All these statutory attempts to insure considered review were thwarted by the C&NW's resort to the declaratory judgment procedure in this case.

III.

The decision below jeopardizes hundreds of section 5(2) arrangements long in force and never before in question, and thereby opens the gates to a flood of litigation involving not only terminal joint-use agreements but trackage rights agreements between line-haul carriers as well.

Not every rail terminal in the country may be served by a jointly-owned terminal railroad, as is Peoria, but many terminals are operated under arrangements that restrict the right of the line-haul carriers to interchange directly.

Such arrangements contribute to the efficient operation of railroad terminals and, like the one here at issue, have been approved by the Commission as terms and conditions of section 5(2) transactions. Decisions involving a few of these arrangements were cited in the petition for certiorari, pages 20-21. Moreover, virtually every trackage rights agreement in force limits the entering carrier's right to serve industries on the leasing carrier's line. See petition, page 28. All of these agreements have been approved under section 5(2). Under the theory of the decision below, however, all of these agreements create unauthorized and unlawful pooling.

With respect to rail terminals alone, the validity and enforcibility of these common arrangements, involving millions of dollars of switching revenue and millions of dollars of investment by the public in the bonds of these terminal railroads, is now subject to attack, despite approval under section 5(2). If one opportunist proprietary line employs the decision below as precedent for obtaining a discriminatory advantage over its co-proprietors, it requires little ingenuity to perceive that these other lines will follow suit. The ultimate result will be piecemeal dismemberment for the terminal railroads and defeat for the efforts of the Commission to achieve consolidation at rail terminals.

The prospect of diversion is made more enticing by the fact that (so long as the decision below goes unreviewed) it can be done without resort to the Commission, which is familiar with the application and interrelation of sections 5(1) and 5(2). Instead the proprietary carrier can escape its solemn contractual obligation merely by filing for declaratory judgment with a single federal judge, who may or may not share the Commission's experience and viewpoint. Certainly the courts should not initially seek to coordinate the carriers' conflicting interests with the de-

mands of the National Transportation Policy. And the single-judge court's view of "competition," molded by experience with antitrust law, will not necessarily coincide with that of the Commission. Cf. *Seaboard Airline R. Co.—Merger*, I. C. C. , 1. C. C. Finance Docket No. 21215 (Dec. 2, 1963).

Petitioners respectfully submit that the decision below, bypassing the mandatory procedure set up by Congress for initial administrative action and orderly judicial review, involves important federal questions which should be reviewed by this Court. It is urged accordingly that rehearing of the petition for a writ of certiorari filed herein be granted and that a writ of certiorari to review the decree of the court below be granted.

Respectfully submitted.

EUGENE R. JOHNSON,
DONALD G. BESTE,
First National Bank Building,
Peoria, Illinois,
Attorneys for Petitioner, Peoria and Pekin Union Railway Company.

W. S. BODMAN,
STEPHEN L. SEFTENBERG,
120 West Adams Street,
Chicago 3, Illinois,
Attorneys for Petitioner, United States Trust Company of New York, as Trustee.

CERTIFICATE OF COUNSEL.

I certify that this petition is presented in good faith and not for delay, and is restricted to a ground specified in rule 58 of this Court.

DONALD G. BESTE.

January, 1964.